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Supreme Court, U.S.
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No. 08-599

IN THE

Supreme Court of the United States

LAUREN BROWNING,

Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This is a factually dense employment matter in which the court below affirmed summary judgment for Respondent on all of Petitioner's claims in an unpublished, non-precedential decision.

Did the Fifth Circuit properly affirm the summary judgment by (1) drawing upon, as do all circuits, a non-exclusive set of "relevant" or "aggravating" factors as a guide to the reviewing the whole of the evidence for constructive discharge and (2) applying the standards in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) in reviewing the context-bound record for evidence of constructive discharge, retaliation and non-promotion?

RULE 29.6 STATEMENT

Southwest Research Institute has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent Southwest Research Institute (the "Institute") respectfully requests that the Court deny the Petition for Writ of Certiorari. Among reasons for denial are that (1) this case involves only correct application of settled law to particular factual circumstances; (2) the Petition is an inappropriate request for this Court to review facts, not law; and (3)

the unpublished, non-precedential decision below conflicts with no decision of any other court.[1]

This case stirred no controversy among the courts below. In a carefully detailed Memorandum and Recommendation, the Magistrate Judge recommended summary judgment for the Institute on all of Petitioner's ("Browning's") claims, which included claims for wage discrimination, failure-to-promote, retaliation and constructive discharge. Pet. App. 25a. The district court, reviewing *de novo*, adopted the Magistrate Judge's entire recommendation and granted summary judgment to the Institute on all claims. Pet. App. 21a. The Fifth Circuit, again reviewing the record *de novo*, affirmed summary judgment for the Institute on all claims in an unpublished, non-precedential decision. Pet. App. 1a. Among the three courts below, there is not a single finding that Petitioner has a triable claim; no tone of dissent has been struck. Yet, Petitioner now asks this Court to sift through the same evidence, and to play the role of the ultimate human resources manager by overriding routine workplace decisions with which she disagreed. This is a fact-intensive employment case that does not warrant certiorari. Sup. Ct. R. 10.

Trying to draw the Court into this case, Petitioner manufactures two purported "circuit splits." No such

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[1] Because the decision below is an unpublished, non-precedential disposition, it is not even precedent in the Fifth Circuit, which by itself renders this case unsuitable for certiorari. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 459 (8th ed. 2002) (Court "does not ordinarily" grant certiorari to review unpublished dispositions).

splits exist. Like all circuits, the Fifth Circuit uses "relevant" or "aggravating factors" as guides to review evidence for constructive discharge. Employment law cases present factually dense and context-bound scenarios. Such guides assist the reviewing court in reaching the correct decision. The Fifth Circuit does not apply the factors on an "exclusive" basis or in a "checklist" fashion.

There is no support for Petitioner's view that the Fifth Circuit failed to apply the *Reeves* summary judgment standards, or applied them differently from other circuits. Nothing in the record indicates the Fifth Circuit weighed evidence, made credibility determinations or improperly discredited evidence—or needed to do so—to determine that no genuine issue of material fact exists on any of Petitioner's claims. This fact-bound case is not proper for certiorari.

COUNTERSTATEMENT

A. Factual Background.

Southwest Research Institute is a non-profit institution that conducts broad-based scientific and engineering research, development, analysis, and exploration across a multitude of disciplines. The Institute is organized into divisions, with each division handling a distinct area of research or analysis. Browning worked in Division 20, the Center for Nuclear Waste Regulatory Analyses, which, at the time of her employment, was devoted nearly 100% to projects

sponsored by the U.S. Nuclear Regulatory Commission. R7:1376.[2]

Browning was hired by the Institute on December 7, 1998. She was offered a limited-term, one-year contract position as a Research Scientist with Division 20 at a salary of $42,000, within the $35-48,000 salary range she indicated in her employment application as acceptable. R7:1392. Nonetheless, Browning rejected this offer and asked for more money. The Institute offered $45,000, and she accepted. R7:1458.

Institute personnel primarily responsible for Browning's interview, selection and hire were Dr. English Pearcy (her immediate supervisor for the entirety of her employment), Dr. Budhi Sagar (Technical Director for Division 20), and Dr. Wes Patrick (Vice President of Division 20). R7:1376.

Browning enjoyed beneficial personnel actions at the direction of Pearcy, Sagar and Patrick. In December 1999, one year after Patrick, Sagar and Pearcy selected her as a one-year term employee, they elected to rehire her by extending her limited term contract for another year. R7:1376. On October 6, 2000, with input and

[2] The Institute cites to the Record in the court below. Volume 7 of the Record contains Defendant Southwest Research Institute's Motion for Summary Judgment, and Volumes 9-12 contain Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment. The Record will be cited as R[v]:[page], *e.g.*, R7:1376. The Supplemental Record contains Southwest Research Institute's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, cited as SR[page].

agreement from Pearcy and Sagar, Patrick recommended that the Institute hire Browning as a regular employee. R7:1457. Selection of Browning as a regular employee was, in effect, a third hiring decision by the same actors that Browning accuses of discrimination.

Browning's employment benefits included regular pay increases. In every year following her initial hire, Browning received, at the recommendation and/or approval of Pearcy, Sagar and Patrick, significant salary increases, averaging 5.5% per year up to the date she quit. R7:1458.

Browning received favorable performance appraisals of her technical work every year of her employment. While her evaluations declined from "Exceeds Expectations" to "Meets Expectations"[3] in January 2003, Browning's employment was never in jeopardy; she was never disciplined or reprimanded for conduct leading to suspension or separation from employment. R7:1432-33, 1465-75. When Browning quit, her performance ranking was Meets Expectation(-), the same ranking she had received the previous year in January 2003, ten months *before* her self-described November 2003 "Earliest Act of Discrimination." R7:1464. She never received a ranking of either "Needs Improvement" or "Unsatisfactory."

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[3] Division 20 evaluates employees based on performance categories: Clearly Outstanding, Exceeds Expectations, Meets Expectations, Needs Improvement and Unsatisfactory. An employee may receive a "+" or "–" to denote slight variations within the overall ranking. R7:1376, 1463.

The evaluations of Browning's work by Pearcy, Sagar and Patrick recognized her professional contributions, in a positive and encouraging manner, while providing counseling where necessary. R7:1465-75. Browning responded favorably to the evaluations. For example, she stated: "I have an excellent job;" "Management provides me information and support in a forthright and responsible fashion;" "[I] want to thank English Pearcy for providing to me much needed encouragement during more troubled times;" and "I appreciate the perspective and words of encouragement that English Pearcy provides me." *Id.*

Yet, as early as January 2001, just months after Browning accepted her Research Scientist position as a regular employee, she expressed dissatisfaction with her job title and requested promotion. In her 2001 self-evaluation in which Browning expressed great satisfaction with her job and spoke highly of Pearcy as her supervisor, she also asked for a promotion. R7:1482. In her January 2002 performance review, Browning again requested promotion despite her unequivocal knowledge of, and failure to satisfy, Division 20's requirement of two consecutive "Clearly Outstanding" reviews before consideration for advancement. R7:1396-1399, 1468, 1493-95, 1499, 1376. Instead, Browning asked the Institute to change the rules for *her* by waiving the standard applicable to her Division co-workers and afford her special treatment above the others. R:1396-97.[4]

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[4] Browning testified as follows: "*Q:* Are you aware of any other employee at the Institute who has had a different protocol than the two successive clearly outstanding rankings applied to them? *A: No. Q:* But you are asking for establishment of a protocol outside of that to be applicable to you. *A: Yes.*" R7:1396-97.

While Browning talked about wanting a larger salary, she never complained she was being paid unequally to males performing similar work. In early 2001, Browning met with Pearcy and showed him a national salary survey and graph she prepared comparing her salary with imaginary employees. R7:1398. In 2002, Browning stated "I feel that I am under compensated for the nature and extent of [my work] relative to my peers." R7:1439. Browning gave no indication of alleged gender bias. To the contrary, she identified three males and two females as her peer group in completing her self evaluation. R7:1491. In 2003, Browning, together with Michael Smith and Randall Fedors, male co-workers and co-members of the Division's management advisory committee ("DMAC"), met with the Institute's human resources department to obtain information for DMAC about how salaries were determined. R7:1399-1402. Browning made no complaint of unequal pay relative to her co-workers, male or female, at this meeting. R7:1404-08.

It is undisputed that Browning never received two consecutive "Clearly Outstanding" reviews, which are required for promotion consideration. Some male comparators had the required Clearly Outstanding reviews but were still not promoted. R7:1354; SR13. Further, the record contains undisputed examples of males who had remained in the position of Research Scientist long or longer than Browning without promotion. R7:1362; 1581, 1592, 1597. Conversely, under the same system, female co-workers received positions, salaries, promotions, and performance appraisals greater than Browning's. R7:1346, 1362-63; 1586. Notably absent is any allegation that Division 20's

requirements were not applicable to all Division 20 employees.

Browning ignores her several negative performance issues as the reason for her failure to achieve Clearly Outstanding evaluations. By selectively omitting any discussion of the "opportunities for improvement" in her performance appraisals, Browning would have this Court believe she was never counseled regarding a single area in which she could improve. ***Every*** performance appraisal she received from the first in August 1999 to the last in January 2004 contained a discussion of opportunities for improvement. R9:1948-91.

Notwithstanding her theatrical description of events—frequently unsupported by any record citations[5]—Browning was indeed reprimanded for engaging in the worst "over per diem" expenditures ever encountered by Division 20 Administration Director Pat Mackin.[6] Browning chose to submit her personal "estimate" of per diem costs and failed to disclose that her estimate was ***not*** in accord with Institute policy. SR97-101. In fact, in Browning's "see if I can slip it by approach" she exceeded the per diem by nearly double for each and every day of a six day trip. SR105.

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[5] *See, e.g.*, Pet. 4, 7-8.

[6] In deposition, Mackin explained that the significance of the problem was not that Browning had exceeded costs but the amount by which she had done so. "Q. Is it true that other people had exceeded costs significantly on other trips? A. ***I've never seen anyone near the amount that Dr. Browning exceeded costs.***" SR101.

Browning selectively states the facts when she accuses Pearcy, her supervisor, of keeping a secret paper trail that documented her performance issues. Bizarrely twisting good management practices, Browning contends that Pearcy's maintenance of notes on subordinates' job performance throughout the year (as opposed to attempting total recall of a year's worth of events at evaluation time) was deceitful, conspiratorial and an act of retaliation. Pet. 5a. Browning conveniently omits Pearcy's direct testimony regarding the equal, non-discriminatory application of record keeping practices to all his staff members.[7]

Browning's rotation from the position of Principal Investigator in January 2004 was not disciplinary. The undisputed testimony establishes that Pearcy went to his supervisor Sagar, discussed rotating Browning from the lead role because it was the normal practice, and obtained approval by Sagar to rotate her out of the position. SR82-84.

Patrick never threatened Browning's job. Browning herself stated only that "I ***feel*** that he then threatened me." R10:2069. There is no testimony that the discussion between Patrick and Browning (occurring one and a half years before Browning quit), involved allegations of gender based wage differences. Browning conveniently omits that Patrick had the same discussion with

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[7] Pearcy testified as follows: "*Q.* And what was the purpose of the file? *A.* ***I keep a file on each of my staff members.*** I keep the performance evaluations that – such as the ones you've showed in these exhibits, and I keep notes and emails that are relevant to their performance." R7:1383.

Browning's male colleague, Mike Smith, regarding the same DMAC meeting in which Smith and Browning participated. SR67-71.

In 2003, Division 20 decided to grow the department and add additional staff. A search commenced for a highly qualified, experienced individual as a Senior Research Scientist, one level above Browning's level. Browning participated in the search and was asked, along with other Division employees, to interview and evaluate applicants. The Institute asked for Browning's evaluation and input on candidates who may become her colleague, demonstrating non-discriminatory treatment and recognition of her value to the organization. Dr. Jude McMurry, a woman with over 12 years of specific nuclear waste analysis experience, was hired before Browning quit, despite Browning's demeaning and negative evaluation of her. Browning was the only interviewer who negatively evaluated the extremely qualified McMurry; stating that she (Browning) "wouldn't work with her," and that McMurry "dressed like a housewife." R9:1888; SR36.

On May 10, 2004, Browning quit, just four months after receiving a "Meets Expectations" evaluation, two months after receiving a 3.5% pay increase, and weeks after an encouraging meeting with Pearcy and prestigious service as the co-chair of the international Materials Research Society 2004 spring meeting. R7:1330; 1458, 1473. Browning's one-line resignation letter provided no reason for quitting, asserted no discriminatory treatment, and complained of no poor (let alone intolerable) working conditions. R7:1498.

B. Decisions Below

Browning brought claims in the Western District of Texas for failure-to-promote and constructive discharge under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and wage discrimination and retaliation under Title VII and the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d), 215(a)(3).

The District Court referred the case to the Magistrate Judge who, in a detailed Memorandum and Recommendation, recommended summary judgment on all claims. Pet. App. 25a. Browning objected to the recommendation, triggering the District Court's *de novo* review of all issues for which proper objections were made. Pet. App. 23a. Finding Browning's objections "without merit," the District Court fully adopted the Memorandum and Recommendation, granted the Institute's motion for summary judgment, and dismissed the case with prejudice. Pet. App. 19a, 24a. Browning appealed to the Fifth Circuit, which affirmed the entire judgment unanimously in an unpublished opinion. Pet. App. 1a.

With respect to Browning's Title VII and EPA wage discrimination claims, the Fifth Circuit assumed "for the sake of argument" that Browning established a *prima facie* case of wage discrimination. Conducting a "careful review" of the record, the Fifth Circuit found that Browning waived any argument based on comparisons to other Research Scientists (Browning's level) and Senior Research Scientists (one step above Browning's level). Pet. App. 6a. The panel also found that the Institute's evidence showed that Browning's "salary

reflected her prior work experience, seniority, job title, field of study, and contributions to the work of the Institute." Pet. App. 5a-6a. Consequently, Browning failed to create a genuine issue of material fact as to whether the Institute's reasons were pretextual, and the court affirmed the summary judgment on the wage discrimination claims. Pet. App. 7a-8a.

The panel found that Browning established a *prima facie* case for failure-to-promote, as the subjectivity of the evaluation criteria could be pretext for discrimination. Pet. App. 10a. However, the Institute produced a host of legitimate, non-discriminatory reasons for Browning's lack of promotion, including: she made gratuitous, negative comments about her colleagues; discussed internal Institute procedures with clients; failed to follow Institute procedures; made an unauthorized business trip; failed to accurately report her time; and was reluctant to participate in certain Institute initiatives. Pet. App. 11a. Browning was unable to produce any evidence of pretext, and the court held that "[b]ased on the evidence offered by Browning, no trier of fact reasonably can infer that the Institute is dissembling to cover up a discriminatory purpose." Pet. App. 12a. The court thus found Browning failed to meet her burden on her failure-to-promote claim, and affirmed the summary judgment. Pet. App. 13a.

By contrast, the Fifth Circuit found that Browning failed even to establish a *prima facie* case on her retaliation claim. Emphasizing that "context matters," *cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), the court concluded that Browning failed to create a genuine issue of material fact as to whether

she experienced a materially adverse employment action. Pet. App. 13a, 17a.

Specifically, Browning's rotation out of the position of Principal Investigator, in light of the "particular circumstances" and "real social impact of workplace behavior," would not dissuade a reasonable worker from making or supporting a charge of discrimination. Pet. 14a-15a. In context, Browning's allegations that she was badgered, harassed and humiliated in a meeting with her supervisor provided "no indication that this conversation was anything other than an attempt to discuss Browning's concerns about her pay." Pet. App. 15a. Browning's allegations of verbal abuse or threats "amounts at best to nothing more than 'petty slights' or 'minor annoyances' that all employees face from time to time." Pet. App. 16a (quoting *Burlington*, 548 U.S. at 68). Browning's allegations that the Institute tried to hire another employee to replace her, suppressed her performance evaluations and subjected her to extra scrutiny were held to be conclusory. Pet. App. 16a-17a. Accordingly, the panel affirmed the summary judgment on retaliation because Browning did not create a genuine issue of material fact as to her Title VII and EPA retaliation claims. Pet. App. 17a.

Likewise, the court found that Browning also failed to establish a *prima facie* case that she was constructively discharged. Looking to factors from other cases as a guide, the court found no evidence of salary decreases or demotion, no reassignment to menial work or a younger supervisor, no offer of early retirement or less favorable employment terms. Pet. App. 18a. Noting that Browning alleged she was constructively discharged

as a result of retaliatory treatment, the panel drew on its earlier analysis of retaliation to hold that "Browning's working conditions were not so intolerable that a reasonable person in her situation would have felt compelled to resign." Pet. App. 18a. The Fifth Circuit therefore affirmed the summary judgment for the Institute on Browning's constructive discharge claim.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S NON-PRECEDENTIAL DECISION CORRECTLY APPLIED SETTLED LAW TO SPECIFIC FACTS AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Petitioner contends that the Fifth Circuit uses a "rigid check list" of aggravating factors to determine whether employment actions rise to the level of constructive discharge, and asserts that if evidence does not fit the supposed checklist, it "vanishes." Pet. 10. Petitioner further contends that the Third, Fifth and Sixth Circuits use a "judicially created" approach to reviewing constructive discharge evidence, whereas the Second, Ninth, Tenth and D.C. Circuits purportedly do not. Neither this "checklist" approach nor this so-called circuit split exist.

A. The Fifth Circuit applies "aggravating factors" non-exclusively, as part of a review of all of the evidence.

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004), this Court described constructive discharge as "an aggravated case" of sexual harassment

or hostile work environment. The Court added that "[a] hostile-environment constructive discharge claim entails something more: [a] plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 147.

Faithful to *Suders*, the Fifth Circuit reviews constructive discharge evidence by examining an employee's "working conditions" for "something more," using "aggravating factors" as a guide. *See, e.g., Aryain v. Wal-Mart Stores*, 534 F.3d 473, 480 (5th Cir. 2008); *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007); *Brown v. Kinney Shoe Co.*, 237 F.3d 556, 566 (5th Cir. 2001); *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). The factors are sometimes referred to as *Barrow* factors. *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir.1994).[8]

The *Barrow* factors are used in a non-exclusive manner, not as a "checklist." *See Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir.1997) ("[t]he list of factors in *Barrow* is non-exclusive"). In fact, *Barrow* itself held that the "list is not exclusive." *Barrow*, 10 F.3d at 297. In that case, the plaintiff had asserted a *non-*

[8] *Barrow* identified the aggravating factors as (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. *Barrow*, 10 F.3d at 297 (listing precedent for various factors).

enumerated basis for his alleged constructive discharge—that a reasonable employee would feel compelled to resign after being unable to obtain regular work on a gang. *Id.* The Fifth Circuit considered the evidence for that additional factor, but concluded that it did not establish a *prima facie* case for constructive discharge. *Id.* at 297-98. Thus, *Barrow* did precisely what Browning contends a court is supposed to do in reviewing a claim of constructive discharge: consider the evidence as a whole, and look beyond any "checklist" of factors.

Recent cases show the lower courts within the Fifth Circuit clearly understand that the *Barrow* factors must be applied non-exclusively. *See McGarry v. Univ. of Mississippi Med. Center*, No. 3:05-cv-792, 2008 WL 3822447, *8 (S.D. Miss., Aug. 12, 2008) ("In determining whether this standard has been met, courts have considered the following, non-exclusive list of events [listing *Barrow* factors]"); *Lindsey v. One Source*, No. C-05-571, 2006 WL 3360285, *4 (S.D. Tex. 2006) ("Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but the Fifth Circuit considers the following non-exclusive factors to be relevant in the analysis [citing *Barrow* factors]").

Another recent case, *Minter-Smith v. Mukasey*, No. 3:03-CV-1057, 2008 WL 2164565, *5 (S.D. Miss., May 22, 2008), exemplifies how non-enumerated factors are considered. The district court noted plaintiff's evidence that no other unit manager had previously been given the onerous burden of supervising more than one unit. *Id.* The court remarked that though the evidence "fails to invoke the most frequently cited factors for

constructive discharge, those factors are not exclusive." *Id.* at *7 (citing *Barrow*, 10 F.3d at 297). "Considering the evidence as a whole," the court found that evidence of "more onerous duties," though not one of the *Barrow* factors, was sufficient to support a jury's verdict on constructive discharge. *Id.* at *6-8. Thus, there is no doubt that courts within the Fifth Circuit understand that they are not bound to use an exclusive checklist, and will affirm constructive discharge based on "relevant" or "aggravating" factors outside the *Barrow* factors.

B. There is no split in the circuits as to the use of "relevant" or "aggravating" factors.

Petitioner claims that the Third, Fifth and Sixth circuits use a "judicially created approach" to reviewing constructive discharge evidence that is at odds with the Second, Ninth, Tenth and D.C. circuits. This supposed "circuit split" does not exist. All circuits review constructive discharge evidence in essentially the same manner.

The Third Circuit uses what it sometimes calls *Clowes* factors in constructive discharge cases. *Cf. Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, *cert. denied*, 114 S. Ct. 441 (1993). However, even in the case cited by Petitioner, the Third Circuit noted that "we have never made the *Clowes* factors an absolute requirement for recovery." *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167-68 (3d Cir. 2001) (noting that list is not exhaustive, and absence of factors is "not necessarily dispositive"). The Third Circuit uses the factors as a guide. *See Konstantopoulos v. Westvaco Corp.*, 112 F.3d

710, 719 n.2 (3d Cir. 1997) (approving of the district court's use of factors as a part of its analysis, and noting "the court merely used these factors ***as an illustrative guide*** in exactly the same manner as this court used those factors in *Clowes*, determining that an absence of strong evidence for any of the factors supported a finding that the plaintiff was not constructively discharged").

The Sixth Circuit has expressly adopted the Fifth Circuit's use of factors to guide analysis of all of the evidence, and has confirmed that the factors are not used as a "checklist." *See Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir. 2005) (citing *Brown*, 237 F.3d at 570) ("It is important to note that while the Fifth Circuit's approach aids in our constructive-discharge determination, its list of factors is not exclusive."); *see also Logan v. Denny's Inc.*, 259 F.3d 558, 570-71 (6th Cir. 2001) ("This [constructive discharge] inquiry involves consideration of the non-exclusive list of factors noted above"). A constructive discharge claim "depends on the facts of each case." *Smith v. Henderson*, 376 F.3d 529, 533 (6th Cir. 2004).

The Second Circuit is in step with the Third, Fifth and Sixth circuits by considering the factors found in its own precedent as the measure for what constitutes constructive discharge. For example, in one case, the court reviewed several of its constructive discharge cases and concluded that "as ineffective or even incompetent as [defendant's] handling of the matter may have been, it does not rise to the level of deliberate action required by our precedent." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000); *see also Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597,

608 n.9 (2d Cir. 2006). By reviewing whether a plaintiff's evidence rises to the level of evidence action required by precedent for a constructive discharge to exist, the Second Circuit performs the same function as if it had begun from a list of factors culled from that precedent. In either case, the court compares the evidence in a context-specific manner to factors that constituted constructive discharge in other cases.

The Ninth Circuit also employs a non-exclusive list of aggravating factors. *See Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) (quoting *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1412 (9th Cir. 1996) (To establish that he was constructively discharged, "a plaintiff must at least show some aggravating factors, such as a continuous pattern of discriminatory treatment")); *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989) (same); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (same). The factors employed by the Ninth Circuit are derived from the same source as in other circuits: precedent from its constructive discharge cases. *See, e.g., Huskey v. City of San Jose*, 204 F.3d 893 (9th Cir. 2000) ("Our precedent, however, supports our conclusion that Huskey's allegations were insufficient as a matter of law to sustain a finding by a reasonable fact finder that his 'working conditions were so intolerable and discriminatory that a reasonable person would feel forced to resign.'") (citation omitted). The Ninth Circuit undertakes the same review as the other circuits in considering the factors that may lead to constructive discharge. *See, e.g., Schrindig*, 80 F.3d at 1412 ("Schnidrig was not demoted, did not receive a cut in pay, was not encouraged to resign or retire, and was

not disciplined . . . his working conditions were not so intolerable and discriminatory that a reasonable person would feel forced to resign.")

It is no different in the Tenth Circuit, which noted in a recent constructive discharge decision that "several cases show the type of evidence plaintiffs must produce to meet their burden" to prove constructive discharge. *Fisher v. Forestwood Co.*, 525 F.3d 972, 981 (10th Cir. 2008). In other cases, the Tenth Circuit lists the factors it uses as a guide. *See Yearous v. Niobrabra County Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997) (listing items as "among the factors we consider in determining the voluntariness of an employee's resignation").

The D.C. Circuit has stated that "the mere existence of workplace discrimination is insufficient to make out a constructive discharge claim," and that constructive discharge "requires a finding of discrimination and the existence of certain 'aggravating factors.'" *Veitch v. England*, 471 F.3d 124, 130-31 (D.C. Cir. 2006); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997); *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981). Like the other circuits, the aggravating factors are culled from the court's precedent. For example, in *Veitch*, 471 F.3d at 131, the court discussed factors accepted and rejected in other cases, and held that, "[a]ccepting [the plaintiff's] assertions as true, we conclude that, as a matter of law, they do not constitute 'aggravating factors' under our Title VII precedents."

In sum, there is no real difference—and certainly no "split"—between the Third, Fifth and Sixth circuits, on one hand, and the Second, Ninth, Tenth and D.C.

circuits, on the other, in how they review constructive discharge evidence. In determining whether conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign, all circuits review all of the evidence of the workplace environment guided by comparisons with "aggravating factors" in other constructive discharge cases.

If Browning's case had been heard in one of the circuits she claims to properly review constructive discharge, her claims still would not have survived summary judgment. Her fundamental argument is that she resigned because she found herself "hitting the glass ceiling" and therefore felt compelled to resign. Pet. 28. An instructive comparison is with *Petrosino v. Bell Atlantic*, 385 F.3d 210, 238 (2d Cir. 2004), where the Second Circuit found that evidence of a "glass ceiling" failed to support constructive discharge, *despite* an underlying finding that there was a sexually hostile work environment. The Second Circuit found that Petrosino experienced a work environment that employees and supervisors made deliberately hostile to women. Nonetheless, the court held that "it is doubtful that a constructive discharge claim can be established by an employee dissatisfied with reduced promotion opportunities." *Id.* at 231.[9] "An employee who anticipates little chance of promotion in a particular job may well decide to seek employment elsewhere, but the employee can hardly demonstrate that the job she in fact holds

[9] The Second Circuit also expressly found that the plaintiff's complaint that her supervisory responsibilities were reduced and transferred to a successor did not support her constructive discharge claim. *Id.*

was rendered so intolerable that she was compelled to quit." *Id.*

By contrast, Browning obtained no underlying finding that the Institute discriminated or created an environment hostile to women and her claims for equal pay, failure to promote and retaliation did not survive summary judgment. Given that the Second Circuit in *Petrosino* found no evidence to support constructive discharge based on an alleged "glass ceiling" and reduction in responsibility despite an underlying finding of a intentionally hostile environment towards women, Browning's constructive discharge claim would have failed in the Second Circuit as well.

The non-exclusive use of aggravating factors is entirely consistent with this Court's statement in *Burlington*, 548 U.S. 53, 69 (2006) that "context matters" in discrimination cases. The Court's materially adverse standard for retaliation was intended to "separate significant from trivial harms." *Id.* at 68. The admonition on the importance of context was part of the Court's discussion of a need for an objective standard that is "judicially administrable." *Id.* The Fifth Circuit's and the other circuits' use of non-exclusive aggravating factors embraces *Burlington*'s direction regarding context while making use of precedent in other constructive discharge cases to foster a judicially administrable approach to reviewing evidence of constructive discharge. Nothing in that approach remotely warrants certiorari.

II. THE DECISION BELOW CORRECTLY APPLIED THE *REEVES* SUMMARY JUDGMENT STANDARDS TO A DENSE SET OF FACTS AND PETITIONER SEEKS AN UNFIT USE OF THE COURT'S SUPERVISORY POWER.

Browning urges the Court to exercise its supervisory power to correct what she calls a "non-application" of the Court's summary judgment standards in *Reeves*. This issue—which ultimately amounts to no more than request for the Court to dig through the facts once more—is an unfit reason for granting certiorari. Sup. Ct. R. 10.[10]

A. This case does not implicate the fundamental issue in *Reeves*.

Browning asserts that the Fifth Circuit does not apply *Reeves* in non-outright termination cases. This assertion is flatly incorrect, and an attempt to dodge the fact that Browning's evidence was so weak that it does not even implicate this Court's fundamental concern in *Reeves*.

In *Reeves*, the Court held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. The lower court "erred in proceeding from the premise that a plaintiff

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[10] Petitioner addresses only the application of *Reeves* to her constructive discharge, retaliation and non-promotion claims. Petitioner has not properly put her wage discrimination claims before the Court. Sup. Ct. R. 14.

must always introduce additional, independent evidence of discrimination" to survive summary judgment. *Id.* at 149. An employer's motion for summary judgment may be denied on the basis of a plaintiff's *prima facie* case and evidence that the employer's legitimate, non-discriminatory reasons for its actions are pretextual. *Id.* at 148-49.

Faithful to *Reeves*, the Fifth Circuit has unequivocally rejected the use of the "pretext plus" standard. *See Ratliff v. City of Gainesville*, 256 F.3d 355, 362 (5th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 n.4 (5th Cir. 2000). The Fifth Circuit reverses summary judgment for employers when the plaintiff has made a *prima facie* case and produced evidence of pretext. *See, e.g., Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Pratt v. City of Houston*, 247 F.3d 601, 606-07 (5th Cir. 2001).

Due to the weakness of Browning's evidence, however, this case does not even implicate *Reeves*' "pretext plus" prohibition. Browning failed to establish a *prima facie* case for constructive discharge and retaliation, and failed to show pretext on her non-promotion claim. Pet. App. 13a, 17a-18a.[11] The issue of

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[11] At one point, Browning confuses the *Reeves* "pretext plus" issue with the Court's doctrine on constructive discharge. The Fifth Circuit does *not* hold that no amount of harassment can constitute constructive discharge. Pet. 24. The statement that "mere harassment" does not constitute constructive discharge follows *Suders*' instruction that constructive discharge requires "something more." *Suders*, 542 U.S. at 147. Notably, Petitioner cites no authority in support of her lengthy statement of the Fifth Circuit's supposed holding. *See* Pet. 24.

whether the court below required "additional evidence" never even arose.

B. The panel correctly applied *Reeves* to Petitioner's retaliation and constructive discharge claims.

Beyond the "pretext plus" issues, Browning's assertion that the Fifth Circuit did not apply *Reeves* rests on distortions of the record and decision below, and a heavy dose of second guessing about whether the Fifth Circuit reviewed the whole record in context, weighed evidence, made credibility determinations, or improperly drew inferences or credited or discredited evidence. *See Reeves*, 530 U.S. at 150-51.

Browning failed even to create a fact issue on her *prima facie* cases for retaliation and constructive discharge. Pet. App. 17a-18a. In the court's careful and thorough discussion of retaliation, the Fifth Circuit went out of its way to emphasize the importance of considering the evidence as a whole and the facts in their context. *See* Pet. App. 13a-17a. The decision expressly cites and heeds the Court's holding in *Burlington*, 548 U.S. at 68, that "context matters" and surrounding circumstances of acts should be considered. *See* Pet. App. 14a.

The panel did not "discount" Browning's evidence regarding her rotation out of the role of Principal Investigator. Pet. App. 14a. Rather, the panel had well-established reasons for finding that the evidence did not enable her to survive summary judgment. Browning admitted that the rotations occurred normally. Pet. App. 14a. Therefore, the court credited this fact for the

Institute as uncontroverted. *Reeves*, 530 U.S. at 151. *Reeves* does not require the court to infer that Browning was rotated out of the Principal Investigator position as a result of retaliation when, as here, the inference is unreasonable and unjustified. *Id.* at 150 (drawing all "reasonable" inferences in nonmoving party's favor); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("all justifiable inferences are to be drawn in [the non-movants'] favor"); *TIG Ins. Co. v. Sedgwick James of Wash*, 276 F.3d 754, 759 (5th Cir. 2002) ("Unsubstantiated assertions, improbable inferences and unsupported speculation are not competent summary judgment evidence."). Further, the rotation had no specific association with protected activity. Pet. App. 15a; *Anderson*, 477 U.S. at 248 (disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion).

The Fifth Circuit found that the badgering, harassing or humiliating conversations alleged by Browning occurred in the context of her request for a significant pay increase, and that her supervisors even offered her a "carrot" to overcome performance violations that would have permitted firing her for cause. Pet. App. 15a. In context, the evidence showed the discussions were simply attempts to discuss Browning's concerns about her pay and did not show retaliation. *Id.* Browning contends that allegations that her supervisor called her "crazy," suggested that she avail herself of the Institute's psychiatric services, and told her that if she did not like that the Institute was doing, "there's the door" were weighed against her. Pet. 26-27. She believes the panel discredited or discounted

evidence of an encounter in which an Institute administrator allegedly confronted Browning in a physically threatening manner over her violation of travel policies. Pet. 27. The court, however, found that in all of these exchanges "context mattered." Pet. App. 16; *Burlington*, 548 U.S. at 68. The evidence was not weighed or discounted; it was too weak to create a triable issue. *Reeves*, 530 U.S. at 148-49. The "heated exchange of words in a work place confrontation presents no set of facts that constitute retaliation" and amounted to nothing more than "petty slights" or "minor annoyances." Pet. App. 16a; *Burlington*, 548 U.S. at 68. Nothing in these holdings contradicts *Reeves* or calls for an extraordinary exercise of this Court's supervisory power to consider the application of settled law to a dense set of facts.

Browning contends that the Fifth Circuit ignored evidence of rating suppression; that Browning was required to get pre-authorization to attend conferences; that her travel requests were subject to an "extra layer of scrutiny" to which male employees were not subject; that the Institute retaliated against her by attempting to hire an employee to take her position, by forcing her to interview and evaluate job applicants as a part of the process, and by suppressing her performance evaluations. Pet. 27. Petitioner also contends that the court discounted evidence that the Center's hiring policy prevented the hiring of a new employee unless there was a vacancy to fill, and that the newly hired geochemist McMurry was allegedly hired to perform the same work Browning had performed from 1998. Pet. 28. The court, however, found that all these allegations were conclusory. Pet. App. 16a-17a. As a result, these allegations were

not competent summary judgment evidence and the court was not involved in weighing or discounting evidence, determining credibility, or drawing inferences from evidence. FED. R. EVID. 56(e); *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("conclusory allegations unsupported by specifics [are] subject to summary dismissal"); *Anderson*, 477 U.S. at 349; *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) ("Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment.").

In sum, the panel correctly applied *Reeves* to Browning's retaliation claim. The *evidence* as a whole—as opposed to conclusory allegations that the panel was not required to credit, or unreasonable inferences it was not entitled to draw—failed to establish a *prima facie* case and created no genuine issue of material fact as to retaliation.

With respect to constructive discharge, the Fifth Circuit certainly did more than apply a checklist. Pet. 19. The panel incorporated its earlier analysis of the facts, including the analysis of retaliation, as a part of its review of all the evidence for constructive discharge. Pet. App. 18a. The Petition shows that the panel was on target giving attention to retaliation, as Browning herself continues to focus her case for constructive discharge on the Institute's alleged retaliation. Pet. 28 (asserting that the "[t]he evidence, taken as a whole, shows a cumulative pattern of adverse conduct by the Institute toward Browning after she voiced a wage discrimination complaint"). The panel

thoroughly reviewed the evidence as a whole, including the "pattern" alleged by Browning, and properly applied *Reeves* to conclude that Browning established no *prima facie* case of constructive discharge. The panel properly affirmed summary judgment in favor of the Institute.

C. The panel correctly applied *Reeves* to Petitioner's failure-to-promote claim.

The Fifth Circuit found that Browning presented evidence sufficient to establish a *prima facie* case of failure-to-promote. Pet. App. 10a. Browning's *prima facie* case, however, quickly dissolved in the face of the Institute's legitimate, non-discriminatory reasons not to promote Browning, including her gratuitous, negative comments about her colleagues; discussions of internal Institute matters with clients; failures to follow Institute procedures; unauthorized business trips; failures to report time; and reluctance to participate in certain Institute initiatives. Pet. App. 11a.

Once the burden shifted back to Browning, she was unable to produce evidence to show that the Institute's reasons were pretextual. Her allegations that her ratings were subjective may have been evidence to support a *prima facie* case, but not pretext. Pet. App. 11a. Petitioner makes the frequent mistake of claiming evidence was weighed or credibility determined where there was no evidence at all. For example, Petitioner contends that the panel discounted evidence that the Institute gave Browning artificially low performance ratings and that the low ratings were based on unfounded allegations by Pearcy. Pet. 25. It is more accurate, however, to state that the panel did not weigh

any evidence because the allegations that her ratings were suppressed due to Pearcy's alleged lies were conclusory. Pet. App. 12a. Conclusory allegations are not competent summary judgment evidence. FED. R. EVID. 56(e); *Blackledge*, 431 U.S. at 74; *Anderson*, 477 U.S. at 349; *Eason*, 73 F.3d at 1325.

Petitioner argues the panel ignored evidence that the Institute judged Browning's performance more strictly than male employees, and that a male scientist was promoted to the next highest level in the career ladder, while Browning was not. Pet. 25. The panel did not "ignore" the evidence, but found the evidence showed "exactly the contrary." Pet. App. 12a. This uncontradicted evidence must be credited in the Institute's favor. *Reeves*, 530 U.S. at 150.

Petitioner argues that the panel required evidence that the Institute's conduct was openly gender-motivated. Pet. 25. This is a mischaracterization of the panel's opinion, which did not "require" evidence of openly gender-motivated conduct, but rather noted the absence of evidence of discriminatory intent. Pet. App. 12a. As *Reeves* reiterates, "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("Although intermediate evidentiary burdens shift back and forth under [*McDonnell Douglas*], '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'").

The Fifth Circuit correctly applied *Reeves* in the case below. This issue does not merit certiorari.

III. THERE IS NOTHING IN THE APPLICATION OF *REEVES* STANDARDS IN THE DECISION BELOW THAT SEPARATES THE FIFTH CIRCUIT FROM ANY OTHER CIRCUIT.

Browning urges that the so-called "non-application" of *Reeves* in the case below makes the Fifth Circuit an outlier among the circuits and creates a "circuit split." As discussed in the previous section, the Fifth Circuit applies *Reeves* in constructive discharge, non-promotion and retaliation cases and does not depart from this Court's precedent in doing so.

Browning identifies two cases that she claims illustrate a correct application of *Reeves* standards, and implies that if the Fifth Circuit had similarly applied *Reeves*, her case would have been decided differently. Pet. 32. However, these cases do not demonstrate that the Second or Seventh Circuits, respectively, apply *Reeves* differently from the Fifth Circuit. The only difference is the plaintiffs had much better cases.

The plaintiff's evidence in *Terry v. Ashcroft*, 336 F.3d 128 (2d Cir. 2003) was far stronger than Browning's. Terry, a white male, produced detailed evidence regarding a number of vacancies for which he was passed over on the basis of race, but the employer failed to present any evidence of a non-discriminatory motive on his non-promotion claims. *Id.* at 138-140, 142. The evidence in *Terry* included hefty testimony that retaliation was commonplace in the defendant INS's

New York District Office. *Id.* at 141. Terry produced explicit, taped conversations of the defendants acknowledging that they denied him opportunities because of his complaints. *Id.* at 143. Terry showed pretext in his suspension from vehicle use because, among other reasons, his suspension came one day after a verbal altercation between Terry and a supervisor where the supervisor said, "we'll take care of you tomorrow." *Id.* at 145.

Browning's claim is thus miles apart from Terry's in the strength of her evidence. The Institute presented extensive evidence of legitimate non-discriminatory reasons for Browning's inability to obtain a promotion. Browning was unable to produce any evidence to show them to be pretextual. Pet. App. 11a. There is no evidence of any kind of discrimination at the Institute of the kind at Terry's INS office, and no reason to believe the Fifth Circuit would have reached a different outcome on these facts. The Second Circuit's proper decision to reverse a summary judgment ruling had nothing to do with the manner in which it applied *Reeves*.

Similarly, Browning's evidence bears no comparison to the strength of the plaintiff's proof in *Boumehdi v. Plastag Holding, LLC*, 489 F.3d 781 (7th Cir. 2007). Boumehdi assisted her supervisor in working a machine at a plastics printing press. Her supervisor said on numerous occasions that "women don't belong in the pressroom" and made crude sex-related comments. *Id.* at 786. When her supervisor saw her leaving the office of the Human Resources director, he said, "you're complaining about me, aren't you?" and warned her that if "[she] didn't watch it, [she'd] be scrubbing the floors

and doing the toilets." *Id.* Boumehdi's supervisor engaged in conduct categorically different from anything Browning alleges of Pearcy or other Institute personnel. Indeed, the demeaning gender-based comment in this case came from Browning herself—who belittled an applicant for "dress[ing] like a housewife," R9:1888, SR36—not from her supervisors. The outcome of this case would have been no different in the Seventh Circuit.

Browning cannot conjure up a circuit split by pointing to reversals in other circuits where the plaintiffs had significantly stronger evidence. These cases do not show any difference in the application of *Reeves*. This fact-bound issue does not warrant certiorari.

IV. PETITIONER WAIVED CORE ARGUMENTS IN THE COURT BELOW.

Browning's claims for wage discrimination under Title VII and the Equal Pay Act were at the heart of her case. The court below correctly found after "a careful review of the record" that Browning waived any argument regarding wage comparisons to numerous male employees at the Institute. Pet. App. 6a & n.4. Browning therefore failed to create a fact issue as to whether the Institute's reasons for disparate wage payments was pretextual. Pet. App. 7a. Due to this waiver, Petitioner cannot raise her wage discrimination claims before this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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